IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FEB 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

RAFAEL HERNANDEZ COLON, individually and as Governor of the Commonwealth of Puerto Rico; Mercedes Otero de Ramos, individually and as Administrator of the Corrections Administration of the Commonwealth of Puerto Rico, and Lorenzo Villalba, Juanita Gómez, Julio Acevedo Ascencio, individually and as members of the Parole Board of the Commonwealth of Puerto Rico,

Petitioners,

v.

CARLOS MORALES FELICIANO, *et al.*,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE

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OCTOBER TERM, 1989

No. 89-1016

RAFAEL HERNANDEZ COLON, individually and as Governor of the Commonwealth of Puerto Rico; Mercedes Otero de Ramos, individually and as Administrator of the Corrections Administration of the Commonwealth of Puerto Rico, and Lorenzo Villalba, Juanita Gómez, Julio Acevedo Ascencio, individually and as members of the Parole Board of the Commonwealth of Puerto Rico,

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Come now Petitioners ("Commonwealth officials"), and respectfully submit their Reply to Respondents' ("Prisoners") Brief in Opposition.

I. SUMMARY OF REPLY

Prisoners, through their counsel, have substantially misunderstood the issues raised by Commonwealth officials in their petition. Consequently, they have made arguments and cited case law completely irrelevant to this Court's consideration of the petition. Most of

prisoners' arguments constitute a diatribe accusing Commonwealth officials of seeking to collaterally attack earlier orders of the district court. None of the arguments presented by Commonwealth officials attempt to collaterally attack any orders of the district court prior to the order increasing the fines which was appealed to the First Circuit.

Prisoners mistakenly address their response to the scope of review by courts of appeal of district court orders. They appear oblivious to the nature of this petition—a request for certiorari review of the judgment and opinion of the First Circuit. This petition presents discreet questions to this Court for grant of a writ of certiorari unaddressed by prisoners' response: (1) whether the First Circuit employed the wrong balancing test in determining the substantiality of compliance by Commonwealth officials to avoid civil contempt fines because of its assumption that the violation of the stipulation in this case constituted an Eighth Amendment harm to the prisoners; and (2) even if there was an Eighth Amendment violation, whether, in institutional reform litigation, a court should hold state officials to strict compliance with a stipulation, instead of employing the flexible standard followed by other courts of appeal in conflict with the First Circuit in this case.

Thus, contrary to prisoners' contention, Commonwealth officials are not seeking review of factual determinations by the district court. They seek review of the correctness of the balancing test used by the First Circuit, which is a question of law relating to that Court's judgment. Commonwealth officials are not asking this Court to review the underlying constitutional issues of the earlier district court orders.

In part, they are seeking review of the First Circuit's assumption that a violation of an overcrowding stipulation involves Eighth Amendment interests.

In addition, Commonwealth officials are not disputing before this Court their obligation to comply with the stipulation, as prisoners claim. Rather, they are requesting review by this Court of an issue of national importance to the judicial administration of consent decrees and stipulations in prison reform litigation, which has resulted in conflicting decisions among the courts of appeal. That issue, which prisoners basically evade or misunderstand, is whether courts of appeal in reviewing contempt sanctions in such cases, should adopt a strict compliance standard, as the First Circuit did here, or whether they should apply a flexible standard which allows the accomplishment of prison reform goals on a realistically achievable basis.[1]

A. COMMONWEALTH OFFICIALS DO NOT SEEK COLLATERAL REVIEW OF ANY PRIOR DISTRICT COURT ORDER; THEY CHALLENGE THE FIRST CIRCUIT'S ASSUMPTION OF AN EIGHTH AMENDMENT VIOLATION FOR NON-COMPLIANCE WITH A VOLUNTARY STIPULATION CONCERNING PRISON OVERCROWDING

The prisoners erroneously challenge the petition as an attempt to collaterally attack the district court's

[1] The additional argument that the petition was untimely filed is frivolous. The Clerk of the United States Supreme Court twice wrote to counsel for the prisoners informing them that the petition was correctly and timely filed on December 26, 1989. The Office of the Clerk has expressed to counsel for Commonwealth officials that the Clerk's Office was closed for filing on December 26, 1989 and that filing the petition with a Supreme Court police officer was standard and correct procedure.

earlier orders.[2] They treat the Commonwealth officials' discussion of the Eighth Amendment issue merely as a "thinly veiled device to make a collateral attack on the merits of the underlying, unappealed orders." *Opp.*, at 19. Prisoners simply have misapprehended the thrust of the Eighth Amendment argument in the petition and its relevance to the strict standard adopted by the First Circuit. Commonwealth officials raise this issue with respect to the First Circuit's unwarranted assumption of an Eighth Amendment violation for noncompliance with a voluntary stipulation with respect to prison overcrowding. *Rhodes v. Chapman*, 452 U.S. 337 (1981). In the absence of an Eighth Amendment interest, there is a compelling reason to utilize a flexible standard to measure the consensual efforts by the states to voluntarily solve prison crowding conditions.

It is also clear that the assumption of an Eighth Amendment interest cannot be based simply on the entry of a stipulation. In *Badgley v. Varelas*, 729 F.2d 894 (2d Cir. 1984) one of the issues was whether the finding by the Special Master that the county defendants breached a consent decree with respect to prisoner population limits constituted a finding of an Eighth Amendment violation. The Second Circuit held that it was error to consider the noncompliance with the consent decree as a constitutional violation. Stated the Court:

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[2] The prisoners are the only ones bringing collateral issues by referring to previously existing conditions of a prison that *was* closed by the Commonwealth more than a year ago, *Opp.* at 23, and citing old opinions of the district court which do not accurately reflect systemwide conditions existing in 1988 or at present.

> Like most consent judgments, the agreement between the plaintiffs and the county defendants contains no admission of liability. In agreeing to specific terms for the operation of the NCCC, the county defendants did not concede that any conditions at the jail falling short of the agreed terms were constitutional violations. The judgement "resolved" the constitutional issues only in the sense that most consent judgments resolves disputes: It obviated any need to determine whether the claims of constitutional violation were established by substituting for adjudication of those claims a contractual agreement between the signatories enforceable as a judgment of the District Court upon the Court's approval of the agreement and entry of a judgment.

Badgley, 729 F.2 at 899. See *United States v. Armour & Co.*, 462 U.S. 673, 681-82 (1971) (consent decree is not to be construed as if "plaintiffs established factual claims and legal theories in litigation.").

B. PRISONERS COMPLETELY EVADE OR MISUNDERSTAND THE COMMONWEALTH OFFICIALS' CONFLICT OF CIRCUITS ARGUMENT RELATED TO THE STRICT VERSUS FLEXIBLE COMPLIANCE STANDARD

Even assuming that the First Circuit correctly found an Eighth Amendment violation, the First Circuit erred in adopting a strict standard that fails to consider the interests of the state and the public, instead of the flexible standard employed by other circuits that does consider these interests. Prisoners

completely evade this issue.[3] They state it is not present because they argue, mistakenly, that the First Circuit rejected Commonwealth officials' claim of substantial compliance and good faith efforts as a question of fact and not as a question of standards.

Once again, the prisoners misapprehend the questions presented on review. In this case, there is no adverse factual determination by the First Circuit as to the significant good faith efforts to comply with the overcrowding stipulation. The First Circuit did not dispute the objective facts on which the substantial compliance and good faith arguments are based; namely, the progress achieved in meeting the requirements of the stipulation, the dramatic increase in prison spending, the growth in prison capacity, weather related construction delays and the unanticipated population growth. Apx. at 9a. Despite these good faith efforts, the First Circuit held they were not enough, and applied a strict standard of compliance. The question presented on review is the standard under which these undisputed facts are to be weighed, which is a question of law. See *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982) (remedy must weigh cost of compliance and security needs); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980) (development of new prison facilities is extremely relevant in fashioning remedy).

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[3] Prisoners' abuse of discretion argument misses the point. The conflict between the circuits is precisely over the standard to be applied in determining whether the district court has abused its discretion in the enforcement of consent decrees and stipulations. Thus, a district court commits an abuse of discretion if it applies a strict standard to judge compliance efforts by state officials when a flexible standard should have been applied.

In sum, prisoners have completely ignored the thrust and importance of this question presented to this Court in the petition. There is a national crisis of prison overcrowding, illustrated by this case, which threatens to seriously disrupt the administration of criminal justice. The gravity of this crisis is underscored by the fact that 41 states (plus D.C., the Virgin Islands and Puerto Rico) are under court orders for prison overcrowding and/or conditions, and by the existence of a conflict among the circuits with regard to appropriate standards to be used by courts in enforcing stipulations and consent decrees in prison reform litigation. This crisis makes it urgent for this Court to resolve the conflict among the circuits and to provide a uniform standard for enforcement of stipulations and consent decrees leading to a workable solution of the prison overcrowding crisis. The national importance of this issue is attested to by the 31 states that have joined the Commonwealth officials as amicus.

C. CONCLUSION

For these reasons and those presented in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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